IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6890 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ABHINAV CO OP HOUSING SOCIETY LTD.

Versus

JAGESHKUMAR CHINUBHAI SHAH

Appearance:

1. Special Civil Application No. 6890 of 1999

MR RAVINDRA SHAH for Petitioner No. 1

MR PK JANI for Respondent No. 1-3

MR SOMPURA, Ld. AGP for Respondent No. 4-6

RULE SERVED for Respondent No. 5-6

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 10/10/2002

ORAL JUDGEMENT

1. The short facts of the case are that the petitioner is a registered Cooperative Society duly registered under the provisions of Gujarat State Cooperative Societies Act (hereinafter referred to as the "Act"). Respondents No.1, 2, and 3 are the members of the petitioner society. The petitioner society had taken loan from Mehsana District Central Coop Bank Limited for the purpose of construction of "A" type and "B" type flats. It is the case of the petitioner society that the amount of the loan is used for the purpose of construction of the flats and the society has apportioned the liability amongst its all members including the respondent members and it is also maintaining separate accounts for each member. It is the case of the petitioner that so far as the bank is concerned, there is only one loan account and bank is not maintaining any separate accounts for each member of the society.

2. The contention of respondents No.1,2, and 3 is that the petitioner floated a scheme by giving public advertisement that if the members of the petitioner society, who are interested to pay off the amount of outstanding loan, they may directly approach the bank and if such payment is made the bank shall give a rebate of 8% in interest. The case of respondents No.1,2 and 3 is that the Bank had separately calculated the loan amount amongst the members of the petitioner society and as per the calculation of the Bank, as on 28-11-1992 respondent No.1 had to pay an amount of Rs.22,454/-, respondent No.2 had to pay Rs.21,334/- and respondent No.3 had to pay Rs.21,977/- and, therefore, respondents No.1, 2, and 3 were called upon by the Bank to pay up the said amounts and accordingly respondents No.1, 2, and 3, by showing their bonafide, paid up their loan amount. It is also the case of respondents No.1, 2, and 3 that the Bank has issued a discharge certificate also as and when the aforesaid amount was paid by respondents No.1, 2, and 3.

3. However, in the year 1994, the Bank filed lavad suit for the recovery of Rs.92,49,272/- against the petitioner society being lavad suit No.365/1994 and the Bank in the said suit who was plaintiff therein obtained attachment before judgement. Since respondents No.1, 2, and 3 had already paid up the amount of the outstanding of the bank, on the basis of the discharge certificate, they moved an application before the learned Nominee in the aforesaid suit on the ground that no amount is outstanding and, therefore, the flats which are in occupation of respondents No.1, 2 and 3 may be discharged from the attachment before judgement or in any case, attachment may be lifted and injunction may also be

vacated. The learned Nominee on 2-8-1995, upon the application of respondents No.1, 2 and 3 below Ex.27, passed the order, whereby the injunction is vacated qua the property belonging to respondents No.1, 2, and 3 allotted by the society and the said suit is pending even today. It appears that respondents No.1, 2, and 3 wanted to transfer their respective flats by way of sale and, therefore, they submitted an application to the society on 5-12-1996. In response thereto, the society communicated to respondent No.1 namely, Jageshkumar Chinubhai that the amount outstanding of the loan is of Rs.1,45,469/= and, therefore, said amount may be paid first and, thereafter the transfer application shall be considered. It is under these circumstances respondents No.1, 2, and 3 approached to the District Registrar by submitting the application under Rule 14(11) of the Gujarat Cooperative Societies Rules for appropriate directions. The District Registrar, after hearing petitioner society passed the order dated 29-5-1997, whereby the District Registrar recorded that the suit is pending. However, the District Registrar found that if the members are ready to comply with the conditions of the transfer, the same should be considered by the society and if the amount is already deposited by the members in the Bank account qua the loan account of the society, the same should also be credit of. Therefore, the District Registrar ultimately passed the order, whereby the direction is given to the society to issue receipt for the loan which is duly paid by respondents No.1, 2, and 3 to Mehsana District Central Coop. Bank Limited and it is further directed that the transfer application of Mr.Jageshkumar Chinubhai dated 5-12-1996 should be considered accordingly. The matter was carried in appeal before the Additional Registrar (Appeals) being revision application No.73/1997. The Additional Registrar (Appeals) found that the District Registrar has not recorded the reasons for the purpose of giving directions and the order is non-speaking order and he also found that the remedy would be under Section 96 of the Act and, therefore, he ultimately allowed the revision application and set aside the order of the District Registrar. Respondents No.1, 2, and 3 herein preferred revision application No.9/1999 before the State Government against the order of the Additional Registrar (Appeals) dated 2-12-1998. The State Government considered the matter and it recorded the reasons that the loan amount of the Bank is paid and the learned Nominee has also vacated the stay order and if the society had any objection at the relevant point of time, it would have objected to the same or if they were aggrieved by the order of the Nominee, they would have

challenged the said order before the Tribunal. However, no action is taken by the Society and, therefore, the society should act as per the order of the District Registrar. Still, however, if any amount is legally recoverable, the same shall be required to be paid by the applicants therein, respondents No.1, 2, and 3 herein. Under these circumstances the present petition.

4. Mr.Shah, learned Counsel appearing for the petitioner has submitted that the State Government as well as the District Registrar should not have finally concluded that no loan amount is outstanding so far as respondents No.1, 2 and 3 are concerned, more particularly when the suit is pending and when the Bank is not maintaining any separate account qua each member of the society. He also submitted that as per the record of the society separate accounts of each of the member of the society are being maintained and as per the said record the society has to recover the amount of Rs.1,45,469/- as submitted before the District Registrar. He submitted that if respondents No.1, 2, and 3 are absolved from the liability of loan transaction without payment of the said outstanding amount, it will not only prejudice the society, but it may also prejudice the other members' financial interest. It has also been submitted that so long as the said loan amount is not paid, the transfer cannot be permitted by the society. He submitted that, therefore, the order of the authority of giving said directions on the basis that the loan amount is fully paid is without there being any material on record and, therefore, the orders passed by the District Registrar as well as that of the State Government deserve to be quashed.

5. On behalf of respondents No.1, 2, and 3, Mr.Jani, learned Counsel, submitted that respondents No.1, 2, and 3 have acted in bonafide and the equitable consideration weighs in favour of respondents No.1, 2, and 3 and in as much as, since the Bank gave public advertisement for the recovery of the loan amount and respondents No.1, 2, and 3 have paid up the full outstanding amount shown as per the record of the Bank and not only that but the Bank has also issued discharge certificate and the Nominee has also vacated injunction on the basis of said certificate. Therefore, he submitted that once the amount of the loan as per the record of the Bank is paid, merely because the same is shown as outstanding in the record of the petitioner cannot be considered for the purpose of recovering the amount from respondents No1, 2, and 3 or in any case the same cannot operate as a bar in transferring the property. He submitted that even in the

order of the State Government it has been stated that if any other legal recoverable amount is there, the same will have to be paid by the applicants. Mr.Jani submitted that, therefore, the interpretation of the order which is sought to be canvassed on behalf of the petitioner is not correct. He also submitted that once the Nominee and the Bank which is plaintiff in the suit have discharged respondents No.1, 2, and 3 from the liability of the loan transaction, it cannot be said that respondents No.1, 2, and 3 are required to make any amount of outstanding loan, which is subject matter of lavad suit No.365/1994. Mr.Jani has also submitted that there is a finding of fact recorded by the lower authority and, therefore, this Court while exercising power under Article 226 or 227 of the Constitution of India may not interfere with the said order and hence the petition deserves to be rejected.

6. Mr.Jani also submitted that the perusal of the certificate dated 14-11-1992 shows that even as per the record of the society so far as Jageshkumar Chinubhai is concerned, the amount outstanding was of Rs.18,840 as on 31-12-1991 and the amount is paid with interest, which amounted to Rs.22,454/- on 28-11-1998 and, therefore, he submitted that respondents No.1,2, and 3 have paid up the amount of outstanding even as per the record of the society and, therefore, the orders passed by the District Registrar as well as of the State Government are legal and valid.

7. In view of the above, before I consider the other aspects of the case, what is required to be noted is that there is no dispute on the point that suit No.365/1994 is filed by the Bank against the petitioner society for the recovery of Rs.92,49,272/=. The transaction of loan is by the Bank with the society. So the primary liability is of the society itself and if the amount of loan is used by the Society for the construction of the flats allotted to its members, possibly the Bank cannot have full details of the amount spent by the society qua each member. It is an admitted position that respondents No.1, 2, and 3 are not defendants or parties to the proceedings of lavad suit No.365/1994. It is true that the amounts of loan as indicated earlier of Rs.22,454/=; Rs.21,334/=; and Rs.21,977/= are paid by respondents No.1, 2, and 3 respectively on 28-11-1992 directly in the Bank and the said amounts which paid by respondents No.1, 2, and 3 to the Bank are required to be given credit by the petitioner society even if the petitioner society maintains separate accounts of each of the member. The order of the District Registrar so far as giving credit

to the aforesaid amounts is concerned, in my view, is legal and valid, because when the member pays directly in the Bank account of the society or he pays the amount in the society for the purpose of giving credit in the loan amount makes no difference because the amount in reality is paid. Therefore, it is clear that respondents No.1, 2, and 3 would be in any case entitled to credit of the amount which is paid by them directly in the Bank qua their liability to the loan amount.

8. However, the question would be what will be the extent of the liability of the member when a composite loan is taken by the society for the purpose of construction of flats or houses for allotment to its members. In a given case, it may vary from facts to facts, but the society and all properties of the society would be subject to the charge of the said loan amount and normally separate, distinctive account qua each flat would not be maintained by the Bank. So far as the rights of the financial institutions vis-a-vis the member and the society are concerned or vis-a-vis the properties of the society are concerned, normally it can be construed that if the society has taken a composite loan and if all the members are similarly situated and the loan amount is equally distributed amongst all members, the liability will be in propotion thereof. If a few members pay up the amount by showing bonafide and as law abiding members, and if some members intentionally or otherwise do not pay up the amount then, in my view, the situation would not be the same. So far as the rights of the Bank are concerned, it is true that the Bank can recover the loan amount from the whole of the properties of the society which may include all the properties which are occupied by the members of the society, but so far as the rights of the members inter se are concerned, I am of the view that the society must consider a reasonable and rather fair interpretation of the liability qua each member. It is for the society to apportion and distribute the liability in proportion to the amounts spent from the loan amount in respect of the members concerned. The members who have already paid the amount fully considering their proportion of liability cannot be made to suffer on account of other members who have not paid the loan amount. As such, so far as the inter se rights of the members of society are concerned, it can be reasonably construed that if such loan amount is not paid and the recovery is to be enforced by the society, it will be qua the properties which are in occupation of the members who have not paid the amount and it cannot be enforced qua the properties which are in possession of the members who have already paid the full amount.

Therefore, there is a considerable force in the contention of Mr.Jani that if the loan amount is already paid by respondents No.1, 2, and 3, they should be treated as discharged from the liability of the loan and they should also be absolved from consequential liability which may arise on account of the lavad suit proceedings. However, the said contention can be fully accepted only if it comes on record that all the loan amount was correctly distributed and apportioned amongst respective members of the society and respondents No.1, 2, and 3 have substantially paid up the amount and they have been discharged from the liability. Merely because the Bank has accepted some amount directly from the members or that the Bank has issued any certificate of discharge, in my view, cannot be said to be final, unless and until the member concerned establishes that correctly apportioned liability is fully discharged by paying the necessary amount. If such an approach is not taken, then merely because the Bank discharges a particular member would make the other member(s) to suffer. Therefore, it must come on record that the member seeking benefits from the discharge of liability of loan amount must prove by cogent material on record after giving opportunity to the society also to put forward the case that he has paid up the apportioned loan amount and the interest thereof. Then only he can be absolved from the liability.

9. In the present case, since the suit is pending, in my view, it was not appropriate on the part of the State Government to make a final observation that the loan amount is fully paid qua the liability of respondents No.1, 2, and 3 and it was required for the State Government to relegate respondents No.1, 2, and 3 to establish the said aspect for the purpose of getting full discharged from the liability after sufficient proof is brought on record in the proceedings of lavad suit No.365/1994. Normally, so far as the outstanding amount by the society from the members is concerned, it would be a dispute under Section 96 of the Act and neither the District Registrar, nor the State Government can finally adjudicate the matter upon the said issue, when it is the subject matter which falls under Section 96 of the Act. In the present case, since the lavad suit No.365/1994 was already filed and was pending at the relevant point of time, it was required by the District Registrar as well as the State Government to leave the matter subject to the final adjudication of lavad suit No.365/1994 by giving opportunity to respondents No.1, 2, and 3 to establish the same in the suit proceedings.

10. As regard the transfer application, in my view,

the said aspect could have been considered by the society subject to the right of recovery of money, if any, ultimately found in the suit proceedings. Mr.Shah states that the society has no objection in considering the direction for transfer part is concerned, since the only direction is to consider the matter.

11. In view of the above discussion, the order passed by the District Registrar and its confirmation by the State Government are maintained with the modification that respondents No.1, 2, and 3 will have to establish their full discharge of proportionate liability of loan amount in lavad suit No.365/1994, if required, by getting themselves impleaded as parties and if ultimately it is found by the learned Nominee that the amount of loan is not fully paid by respondents No.1,2 and 3, then respondents No.1, 2, and 3 will be required to pay up the said amount to the society. Subject to the aforesaid modification, the order passed by the District Registrar and its confirmation by the State Government shall continue to operate.

12. In view of the above, the petition is allowed to the aforesaid extent only. Rule is made absolute accordingly. No costs.

10-10-2002 (Jayant Patel, J.)

vinod